VIRGINIA LAW REGISTER

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118 Virginia.

Through the courtesy of the Michie Company, Volume 118 of the *Virginia Reports* has been placed upon our table. Ninety-five cases are reported in this volume, of which ninety are civil and four criminal. In one case a mandamus was awarded. In forty-six civil cases the lower court was affirmed, and in forty-three civil cases the lower court was reversed. The lower court was affirmed in one criminal case and reversed in three. Twenty-three of the civil cases reported were appeals either by corporations or parties suing corporations. Where the corporation appealed four cases were affirmed, and two were affirmed where the appeal was by the individual. Thirteen cases were reversed where the corporation was appellant or plaintiff in error, and one reversed on an appeal by a private individual. We made this analysis of the latter cases at the request of a prominent member of the bar, who seemed to think that the lower courts erred to a large extent where corporations were concerned, but we do not think that this statement is borne out by the facts. Considering our method of selecting juries and our system of instructions we think the statement above shows that the lower courts do not err to a greater extent in corporation cases than in any others. Of course a great number of appeals are refused or writs of error not granted, and were these taken into consideration we have no doubt that our lower courts would stand just as well as any tribunals in the country.

Sunday Laws.

It is said that one of the hoodlums in New York City stumbled by accident into a revival meeting where he heard a very pathetic account of the sufferings and death of Christ. On getting out from the meeting he met an unfortunate Jew and at once proceeded to

knock him down and commenced to belabor him. When the Israelite asked why he was being thus punished the hoodlum replied that he had crucified his Saviour. He was met with the reply, "Why that happened two thousand years ago!" "That may be," replied the hoodlum, "but this is the first time I have heard of it."

This anecdote reminds us of the sudden spurt of energy which seems to be put forth by a good many of the officials of the Commonwealth in regard to the violation of what our statute terms The "Sabbath" Law, and from the zeal evinced by these officials one would think that they had just heard of the statute. This statute has been upon the books from 1786, and while the act amending the law, page 751, Acts 1916, raises the penalty to $5.00 and declares that to be a misdemeanor which had always been a misdemeanor, and exempts the delivery of ice cream from the severe penalties of the law and permits the justice to require a bond to be of good behavior and to refrain from breaking the Sabbath, there is practically no difference between the old law and the new, and while the newspapers have made much "miration" over this *new act,* it is really a very old act awakened into sudden activity. We commented in 19th VIRGINIA LAW REGISTER, page 709, on the use of the word "Sabbath" for "Sunday," and the truth of the matter is that the use of the word "Sabbath" is a mistake: the act should have said "the Christian Sunday," or the "first day of the week," though we have no doubt that the courts would define "Sabbath" to mean "Sunday." At the same time the sudden spurt to enforce this law can only be accounted for by another law passed by the same Legislature and to be found on page 767 of the Acts of 1916.

Double Punishment for the Same Offense.

The enforcement of the Sunday laws has given rise to a rather curious state of affairs, the statement of which and the law as laid down in the books must occasion some surprise to the profession who have never examined into the question; and whilst the weight of authority seems to be all one way, in our judgment the way in which this

offense is punished in some of the municipalities seems to us to be in direct violation of our Bill of Rights. Most cities have a municipal ordinance punishing Sunday violation in terms almost the same as our statute—indeed we know of one city in the state whose ordinances have made every misdemeanor a violation against a city ordinance, the effect of which is as the law stands that a man can be twice punished for the same offense. In other words—in one of the corporation courts of this state an appeal was tried from the judgment of a police justice fining a man for selling goods on Sunday. The jury acquitted him. He was then tried for violation of the city ordinance and convicted by the magistrate and fined. He took an appeal which at present has not been tried. The weight of authority, however, seems to be that where the same act constitutes two crimes, one violating a city ordinance and the other violating a state statute, one charged therewith may be tried for both, and that a conviction or acquittal of either is no bar to a conviction for the other. This has been held to be the law in Alabama, Colorado, Florida, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Missouri, Ohio, South Carolina and Tennessee. California, Connecticut, Kentucky, North Carolina, Texas, West Virginia and Georgia, have held otherwise, though there is a conflict of authority in the latter state. In the case of Moundsville *v.* Fountain, 27 West Va. 182, the court of West Virginia, whilst holding that, where when a fine was the punishment for the breach of a municipal ordinance the payment of such fine may be enforced by imprisonment, yet the Legislature having enacted laws for the punishment of a statutory or common law crime by imprisonment, could not authorize the authorities of any municipal corporation to punish the same offense by imprisonment, for if it did so it would violate our Bill of Rights, which provides that no person shall be put twice in jeopardy of life or liberty for the same offense. The distinction seems to us decidedly specious that that one prosecution for the violation of a state law is not the same for a breach of a municipal ordinance, which is only quasi criminal. In the United States Supreme Court in the case of Cross *v.* North Carolina, 123 U. S. 131, it has held that the same act may constitute an offense equally against the United States

and the state and be punished by both. U. S. *v.* Barnheart, 22nd Fed. 285. The identical case has never been before the Virginia Supreme Court, but in Thon's case, 31 Grat. 887, and Morganstern *v.* Commonwealth, 94 Va. 790, the court sustained a conviction under an indictment for keeping a barroom open on Sunday though the accused pled in bar that he had been convicted under an ordinance of the police court for the same offense. The court drew a distinction—it seems to us rather fine—between the statute and the ordinance, the statute providing that the barroom could not be kept open between 12 o'clock Sunday night and sunrise of the next succeeding morning, and the ordinance providing that the barroom should be closed "from Sunday during the whole day." The statute in that case provided "that this law shall not apply to any city having police regulations on this subject and an ordinance inflicting a penalty equal to the penalty inflicted by this statute." The court held that the ordinance and the statute were not the same and sustained the double conviction in both cases. This is undoubtedly the law but it seems to us certainly an evasion of the Bill of Rights.

The Ouster Law.

We refer to the so-called "Ouster" law, which, like the amendment to the Sabbath law, is simply re-enacting in a little different shape Section 821 of the Code of 1904, which section has been upon the Statute Books from time immemorial. The so-called Ouster Act attempts to define "malfeasance, misfeasance, incompetency or gross neglect of official duty," but we hardly imagine that any definition of these terms was necessary, as we think that an officer getting drunk would certainly be guilty of misconduct, which would justify his removal, and certainly any officer violating a penal statute involving moral turpitude would be guilty of equal misconduct. It is true that the act sets out at greater length the method of procedure and introduces the new official known as the commissioner of prohibition as a prosecutor in certain cases. Both of the acts referred to in this and the preceding editorial, it seems to us were absolute works of supererogation. Why any official should be stirred to sudden activity

by the passage of either is a source of wonderment to us, unless it may be that they served the purpose of the revival meeting mentioned in the first editorial and brought to such official's attention what ought to have been well-known statutes but of which he had never heard.

The Law as to Juries.

Perhaps there is no portion of our Code in which careful revision is more necessary than in that relating to juries—grand and petit, regular or special.

In the first place too many people are exempt. No state in the Union, we venture to say, has as many exemptions as our own and as many classes of men most fitted for jury service exempted from it.

Then the method of selection might be improved upon. The work now put upon the circuit judge in making up annual jury lists ought to be taken from his shoulders. He—after all—in most of the counties in his circuit, certainly outside of his home county, has to call in the aid of other persons in making up this list.

A system of jury commissioners, it seems to us—say one commissioner from each magisterial district, appointed by the judge—might prove valuable. Let them be appointed, sworn, and each August select from their districts a certain number of men to constitute the material from which juries might be selected. If the judge selected—as we have no doubt he would—the best men, they could be depended upon in their turn to select the best men for jury service.

But one serious defect in our law is the failure to adapt the various portions of our statutes relating to the several classes of juries to the change from juries of twelve to juries of seven. For instance: In any case to be tried by a jury in which a county, city or town is a party there is no reason why the jury should consist of a larger number than in any other case. And yet if the trial is to be had in a court of said city, county or town, under Section 3159 the judge in vacation or the court shall upon application of either party order such number of persons (not less than

twenty) to be summoned from an adjacent county, city or town. From those summoned a panel of *twenty* qualified jurors, etc., shall be made, and from this twenty shall be selected a jury of *twelve* for the trial of the case.

Why should there be *twelve* in this case? Why not summon *twelve* and let nine be selected by lot from this twelve and then a jury of seven be made up in the usual manner.

The query has been made—Can the judge or court in case of a corporation summon from the adjacent county, or must the corporation court summon from an adjacent city and the circuit court from an adjacent county? We believe that either judge can select either from an adjacent city or county or town the number required, though the question is not entirely free from doubt.

Again—A *special* jury under section 3158 has to be composed of twelve persons, from whom sixteen are selected and this number reduced to twelve by each side striking off until that number is reached.

Why *twelve* in this case any more than in any other? We are satisfied that the whole law in relation to juries should be simplified and brought into harmony with the changes made under the new constitution.

What's the Remedy?

The last meeting of the American Bar Association was notable in many ways. We have no space available to give what we would like to give of its deliberations. The address of Elihu Root was one, as is usual with that distinguished lawyer and statesman's addresses, of much interest and ability.

We were particularly struck with his observations on the increasing number of lawyers—or practitioners of the law—but cannot say that his views as to the curtailment of that rapidly increasing number are sound. Neither do we agree with him as to the cause of this increase. He attributes it in part to the laxity in the education afforded by the law schools and the comparative ease with which a license to practice law is obtained. Never in the history of the profession have the law schools required more

of the student and at no time in the last fifty years has it been harder to obtain a license. Take our own State: Forty years ago the degree of Bachelor of Law could be obtained in one year. The examination for a license was a farce. One judge who examined the writer asked him but two questions: One was, under whom he had studied law. When the answer was given that John B. Minor had been our teacher the judge growled out, "Then you know more than I do." The second question was, "When do they cut clover hay"? The reply was, "When it gets ripe, I suppose." Whereupon the learned judge grunted out, "Of course not. They cut it while it's green. If you are no better farmer than that I suppose you'll make a lawyer." And the license was signed. The second judge—one of the most amiable members of the Court of Appeals in the seventies—asked a few questions which any student could have answered, and we were accordingly licensed to practice law in all the courts of the Commonwealth. And yet under that system the annual number of men admitted each year to the Bar was not one-half of the number now admitted. Nor do we believe from an experience stretching over many more years than we are willing to admit, that the men who have come to the Bar in the last two decades are in any way superior to those admitted under the loose methods in those days. One thing we are sorry to have to say: The ethical sense of the lawyer does not seem to us to have improved along with the higher education. The "ambulance chaser" was a thing almost unknown in those days. But a week ago an accident happened in a manufacturing establishment the writer wots of, and the injured man was taken to a hospital. Two lawyers called to see him—unsolicited—before his leg was set; three more tendered their services before he left the ward. All were men of good legal education, who had passed a rigid bar examination and one of them spoke with a *naivete* absolutely amusing of his failure to get to the victim first.

None of them were employed, we are glad to say, and no suit was brought. We know of another case in which a reputable firm of lawyers agreed to take a damage suit on a contingent fee of one-third. The prospective client asked for time; was met

by a young barrister who told him, when the other's fee was mentioned, that he would be only too glad to take the case for a fourth. He took it and lost it. There may have been—doubtless were—sporadic cases of this sort in the old days. It seems to be a common occurrence now.

Senator Root is doubtless right. There are too many lawyers. The struggle for existence amongst them leads to loss on the ethical side of the profession. No education, no rigid bar examination can prevent this. The education must commence after the student begins to practice and must be in the hands of the older and higher-toned members of the bar. The fault of most lawyers is in their sympathy with the struggling young man and their willingness to overlook slight peccadiloes. The sympathy is all right, but to overlook breaches of the ethics of the profession is all wrong. Counsel, reproof—sterner measures, if necessary—are due from the older members of the bar and from those who desire the profession to occupy the high place to which it belongs. Unworthy members should be mercilessly weeded out or gotten out by some method.

Some years ago we knew of the case of an unfortunate young practitioner of the law who defaulted for an amount not very large, but sufficient to make him liable to a prosecution for grand larceny. The amount due by him was quietly raised by members of his bar and he was informed that his debts would be paid if he gave up the practice. He readily consented—kept his word, and today is making a living in a humbler station, for which he is much better fitted. Sympathy here was shown in the right way.

Mr. Root is undoubtedly right—there are too many lawyers. But the law schools are busily engaged in grinding them out every year and they take their places—to sink or swim. As long as there is any litigation there will be lawyers. The pity of it is that the increase of lawyers tends to increase litigation and the stirring up of strife is the one thing the wise and conscientious lawyer strives to prevent.

The Chinese pay their doctors as long as they remain well. The moment illness breaks out in any family which employs a physician his salary stops. A great many of the trusts and large manufacturing concerns and corporations pay large salaries to counsel whose advice is constantly sought to keep these concerns out of litigation. The bar associations of many of the states are now appointing committees to device plans for the prevention of unnecessary litigation. The committee from the New York Association has made a report suggesting a few simple rules to prevent the starting of suits. They refer to the taking of advice of counsel in all matters referring to wills, contracts, real estate and corporations, and suggest methods of avoiding litigation both before and after an action has begun; how to minimize and adjust differences and how arbitration should be substituted for litigation. The suggestion that *all* contracts should be drawn by counsel learned in the law is of course valuable, but the difficulty in all of the suggestions is that they do not reach the body of the people. We hope at a later date to refer more at length to this report.

The Lessening of Litigation.

Specialization amongst lawyers is suggested and a hint that all legislation ought to be submitted to the ablest members of the bar before enactment. That the ordinary practitioner should consult a specialist on contracts—or upon wills or upon other subjects—is the suggestion of a member of the committee. In other words—we are to adopt the English plan of having draughtsmen of conveyances—of pleading, etc., whom the ordinary practitioner may consult. We believe that the time will come when we will have something in this country like solicitors and barristers—specialists even among them. In the great cities this has already commenced and in time it will drift down into the smaller towns. But "the time is not yet," as the Scripture sayeth.